

b) EAI

309. While the Cable Operators claim they have been busy making corrections, they have failed to provide EAI with any notice or other evidence of their activity since February 2004.⁵⁴³ Poles are a dynamic environment; failure to notify EAI as to work done to correct violations runs the risk of an intervening event altering the composition of the pole further and preventing EAI from assessing the adequacy of corrections. This is an unreasonable practice. [Complainants cannot stipulate to this question for the reasons set forth below. Further, EAI has not identified a record cite.]

3. Stipulated law

310. None.

4. Disputed law

311. EAI has a strong and pressing interest in the safety of its plant, which requires prompt notification by attaching entities when they alter their attachments. It is unreasonable to withhold data as to corrections or other work performed on EAI's poles that impacts the safety and reliability of its facilities and may impact or otherwise interfere with EAI's ability to manage its facilities and provide service to the public. A delay of more than one year is *per se* unreasonable, and merits the imposition of an immediate accounting. [Complainants cannot stipulate to this question for the reasons set forth below. Further, EAI has not identified a record cite.]

⁵⁴³ Response ¶ 415; Arnett Decl. Resp. Ex. 1 at Attachment C.

E. Whether It Was Just And Reasonable For EAI To Presume That Complainants Were The Last Attachers To The Pole And Therefore Responsible For Creating Violations And/Or Non-Compliant Conditions.

1. Stipulated facts

312. None.

2. Disputed facts

a) Complainants

313. It is unjust and unreasonable for EAI to presume that Complainants were the last attachers to the poles and therefore responsible for creating violations and/or non-compliant conditions. [EAI cannot stipulate to this statement as it is Complainants' conclusion of law and for the reasons cited below.]

314. Although the initial construction sequence was likely electric, telephone and then cable, the facts of modern field construction show that it is wrong to presume that cable attachments were last to the pole and therefore the cause of non-compliant conditions.⁵⁴⁴ [EAI will stipulate to the initial construction sequence of first electric, then telephone and then cable. EAI cannot stipulate to the remainder of this sentence as it fails to account for the fact that EAI and USS also take into account all other evidence, including physical evidence, as to who was last to the pole.⁵⁴⁵]

⁵⁴⁴ Harrelson Reply Decl. ¶ 26-32 (including text and photo at top of p. 26); Gould Decl. ¶ 23.

⁵⁴⁵ Wagoner Decl. Resp Ex. 18 at ¶¶ 20-27.

315. Electric utility networks are not static. Utilities, including EAI, continue to install new equipment to keep up with development and growth.⁵⁴⁶ [EAI cannot stipulate to this statement, as it omits the non-static nature of the cable plant and the new attachments and upgrades it seeks to make.]

316. In many circumstances in Arkansas EAI installs the transformers, drops and street lights *after* cable operators have already installed their facilities.⁵⁴⁷ [EAI cannot stipulate to any of the remaining paragraphs in this section. Complainants generalizations and conclusory statements do nothing to resolve the specific issue of who is responsible for fixing a particular violation. EAI has, and will, take into account all information as to who was last to the pole.⁵⁴⁸ As stated elsewhere, EAI can determine the age of its own plant. EAI does not, however, have access to any cable-specific records.⁵⁴⁹]

317. In many cases, EAI has installed facilities improperly and created violations with respect to cable and telephone facilities, ground clearances and others.⁵⁵⁰ [EAI cannot stipulate to this statement as it is factually incorrect and seeks to draw unsupported broad conclusions as to the

⁵⁴⁶ Harrelson Reply Decl. ¶ 26-32 (including text and photo at top of p. 26).

⁵⁴⁷ Harrelson Reply Decl. ¶ 26-32 (including Figure 26A); Harrelson Reply Decl., Figures 38A, 41A, 42A, 47A; Gould Reply Decl., ¶ 22; Hooks Decl. ¶ 21.

⁵⁴⁸ Wagoner Decl. Resp. Ex. 18 at ¶¶ 20-27.

⁵⁴⁹ See, e.g., Buie Decl. Resp. Ex. 4 at ¶ 49.

⁵⁵⁰ Harrelson Reply Decl. ¶ 26-32 (including Figure 26A); Harrelson Reply Decl., Figures 38A, 41A, 42A, 47A; Gould Reply Decl., ¶ 22; Hooks Decl. ¶ 21; Billingsley Reply Decl. ¶ 26-27, 46.

state of EAI's plant and its practices based on a few isolated incidents that have been incorrectly analyzed.^{551]}

318. Complainants have identified many examples of EAI creating violations *after* cable facilities are installed.⁵⁵² [EAI cannot stipulate to this statement for the reasons cited above.]

319. EAI does not comply with its own construction standards.⁵⁵³ [EAI cannot stipulate to this statement for the reasons cited above.]

b) EAI

320. EAI's disputed facts are the same as those identified in the prior section on assignment of responsibility for remediation (Section VII.A.).

3. Stipulated Points of Law

321. None.

4. Disputed Points of Law

a) Complainants

322. It is unjust and unreasonable for EAI to presume that Complainants are responsible for violations on poles. (Complainants cite all record evidence set forth in its disputed facts section above). [EAI cannot stipulate to this statement as it is Complainants' conclusion of law.]

⁵⁵¹ See generally, Buie Decl. Resp. Ex. 4 at ¶¶ 43-86 and associated attachments.

⁵⁵² Harrelson Reply Decl. ¶ 26-32 (including Figure 26A); Harrelson Reply Decl., Figures 38A, 41A, 42A, 47A; Gould Reply Decl., ¶ 22; Hooks Decl. ¶ 21.

⁵⁵³ Harrelson Reply Decl. ¶¶ 64-76; Billingsley Reply Decl. ¶¶ 26-27, 46; Gould Reply Decl. ¶ 18, 24.

b) EAI

323. As stated above in the prior section (VII.A) on assignment of responsibility for remediation, FCC precedent and the pole attachment rules generally endorse the view that the burden falls on the party controlling the information to come forth with that information.⁵⁵⁴ The Cable Operators are in control of the data related to their own facilities and therefore bear the burden.⁵⁵⁵ They have not, however, produced any data to justify their claims as to (a) grandfathered compliance with prior editions of the NESC; or (b) the relative age of facilities on a pole (*i.e.*, who is responsible for creating a non-compliant condition), nor have they otherwise presented quantitative data to rebut EAI's inspection statistics that illustrate widespread and specific instances of non-compliance with contract standards and/or with the NESC.⁵⁵⁶ The Cable Operators' poor record keeping cannot operate to shield them from their responsibility to maintain the safety of their facilities on EAI's poles. The Complainants, therefore, have not met their burden, whether they bore it initially or whether it was shifted to them as a result of EAI's inspection efforts and resulting data. [Complainants cannot stipulate to this paragraph because it reiterates facts with which Complainants already disagreed above. Further, Complainants strongly object to Entergy's interjection of a discussion of burden. The parties have not addressed or briefed what burden Complainants bear as a result of Entergy's inspection.

⁵⁵⁴ *Knology* at ¶ 42.

⁵⁵⁵ Buie Decl. Resp. Ex. 4 at ¶ 49.

⁵⁵⁶ Kelley Decl. Resp. Ex. 11 at ¶¶ 6-8.

b) EAI

323. As stated above in the prior section (VII.A) on assignment of responsibility for remediation, FCC precedent and the pole attachment rules generally endorse the view that the burden falls on the party controlling the information to come forth with that information.⁵⁵⁴ The Cable Operators are in control of the data related to their own facilities and therefore bear the burden.⁵⁵⁵ They have not, however, produced any data to justify their claims as to (a) grandfathered compliance with prior editions of the NESC; or (b) the relative age of facilities on a pole (*i.e.*, who is responsible for creating a non-compliant condition), nor have they otherwise presented quantitative data to rebut EAI's inspection statistics that illustrate widespread and specific instances of non-compliance with contract standards and/or with the NESC.⁵⁵⁶ The Cable Operators' poor record keeping cannot operate to shield them from their responsibility to maintain the safety of their facilities on EAI's poles. The Complainants, therefore, have not met their burden, whether they bore it initially or whether it was shifted to them as a result of EAI's inspection efforts and resulting data. [Complainants cannot stipulate to this paragraph because it reiterates facts with which Complainants already disagreed above. Further, Complainants strongly object to Entergy's interjection of a discussion of burden. The parties have not addressed or briefed what burden Complainants bear as a result of Entergy's inspection.

⁵⁵⁴ *Knology* at ¶ 42.

⁵⁵⁵ Buie Decl. Resp. Ex. 4 at ¶ 49.

⁵⁵⁶ Kelley Decl. Resp. Ex. 11 at ¶¶ 6-8.

To the extent this is a discussion of Complainants' burden generally as a matter of law, it is inappropriate. It is Entergy, not Complainants, that bears the burden of justifying its denial of access and unjust and unreasonable terms and conditions of attachment.^{557]}

F. Is It Reasonable To Require The Cable Operators to Correct Violations That They Caused

1. Stipulated facts

324. None.

2. Disputed facts

a) Complainants

325. Complainants have always agreed to correct violations for which they are responsible. Complainants do not agree to correct violations caused by other attachers, including EAI. Further, Complainants do not agree that all of the "violations" EAI cited are in fact violations. Complainants positions on this issue, with record cites, are set forth elsewhere in this document.

[EAI cannot stipulate to these statements for the reasons addressed elsewhere. EAI has not required Complainants' to correct violations that are caused by other attachers.]

b) EAI

326. None. The question posed is a question of law.

⁵⁵⁷ 47 C.F.R. § 1.1409(b).

3. Stipulated points of law

327. A company responsible for causing a violation is responsible for correcting that violation.

4. Disputed law

a) Complainants

328. None.

b) EAI

329. None.

VIII. ACCESS

A. Is It Reasonable To Deny Or Condition Access Based On Widespread Safety Violations, Or Where Poles For Which Access Is Sought Are Adjacent To, Or Potentially Impacted By, Other Poles With Safety Violations?

1. Stipulated Facts

330. None.

2. Disputed Facts

a) Cable Operators

331. This question is inappropriate because it assumes facts not in evidence. Whether there is significant evidence of widespread safety violations is strongly disputed. Complainants do not concede that there is evidence of widespread safety violations or that all poles in a circuit are potentially affected by other poles with violations in that circuit.⁵⁵⁸ As a

⁵⁵⁸ Summary pages, Response Exhs. 90-93; Billingsley Reply Decl. ¶¶ 6-16; Hooks Reply Decl. ¶¶ 5-12; Gould Reply Decl. ¶¶ 6-12; Allen Reply Decl. ¶¶ 4-12; Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response

result, Complainants cannot stipulate to or offer any facts or law in response to this question. The appropriate question for the FCC to consider is “Whether EAI has denied access in violation of Section 224?” Complainants answer that question at subsection VIII, below. [EAI cannot stipulate to any of these statements for the reasons below.]

b) EAI

332. EAI conditioned access to its poles in the past on remediation of safety violations on the applicant’s existing attachments in a circuit for which it seeks attachment.⁵⁵⁹ For recent applications submitted since January 2005, EAI has either granted unconditional access, or has required correction of safety violations on poles adjacent to the poles for which access is sought.⁵⁶⁰ [Complainants cannot stipulate to these facts for the reasons set forth above.]

333. The Cable Operators did not submit any attachment applications to EAI for consideration during the time in which they claim that EAI undertook a permitting “freeze.” Despite the alleged denial of access, Comcast proceeded to continue to make installations on EAI’s

Exhibit 91; Trouble Ticket 100009396, page 12, Tab 3, Volume 4, Response Exhibit 93; Trouble Ticket 1001045047, page 28, Tab 1, Volume 1, Response Exhibit 92; Outage Summary Charge, Reply p. 14; Trouble Ticket 1038412558, page 20, Tab 15, Volume 2, Response Exhibit 90; Trouble Ticket 1022516697, page 39, Tab one, Volume one, Response Exhibit 92; Harrelson Reply Report ¶¶ 12-15.

⁵⁵⁹ Welch Decl. Resp. Ex. 19 at ¶ 23.

⁵⁶⁰ Welch Decl. Resp. Ex 19 at ¶ 23.

distribution poles without submitting a request for attachment.⁵⁶¹

[Complainants cannot stipulate to this paragraph for the reasons set forth above.]

3. Stipulated Points of Law

334. Complainants cannot stipulate to any facts or law in response to this question for the reasons set forth above.

4. Disputed Points of Law

a) Cable Operators

335. Complainants cannot offer any facts or law in response to this question for the reasons set forth above.

b) EAI

336. Utilities may deny access to poles for reasons of insufficient capacity, or for reasons of safety, reliability and generally applicable engineering purposes.⁵⁶² EAI would have been justified in denying access based on the widespread nature of the violations identified with respect to Complainants' plant.⁵⁶³ The language of the statute does not limit safety, reliability or engineering considerations to a particular pole to which attachment is sought. These concepts necessarily encompass the safety, reliability and engineering issues of the *entire electric plant*, not just an isolated pole. [Complainants cannot stipulate to any facts or law in response to this question for the reasons set forth above.]

⁵⁶¹ Tabor Decl. Resp. Ex. 17 at ¶¶ 9, 10.

⁵⁶² § 224(f)(2).

⁵⁶³ Buie Decl. Resp. Ex. 4 at ¶ 38; Welch Decl. Resp. Ex. 19 at ¶ 23.

337. The limited conditions placed on the Cable Operators' access, therefore, are eminently reasonable.⁵⁶⁴ The linear nature of the pole plant makes it reasonable for a utility to take into account the safety and engineering concerns on adjacent poles when considering a request for access.⁵⁶⁵ Safety concerns such as low hanging cables or guying deficiencies, for example, may result in physical damage to adjacent poles or cascading electric failures.⁵⁶⁶ [Complainants cannot stipulate to any facts or law in response to this question for the reasons set forth above.]

B. Whether EAI has denied access in violation of Section 224?

1. Stipulated facts

338. None

2. Disputed facts

a) Complainants (Comcast and Alliance)

339. EAI imposed a permitting freeze on Complainants in violation of 47 U.S.C. § 224. EAI refused to permit Comcast and Alliance to make any further attachments on EAI poles until each Complainant completed corrections of the violations in each circuit.⁵⁶⁷ [EAI cannot stipulate to these statements for the reasons stated below, including the procedural infirmities of Complainants' claims.]

⁵⁶⁴ Resp. at ¶¶ 114-116.

⁵⁶⁵ Buie Decl. Resp. Ex. 4 at ¶¶ 35-42.

⁵⁶⁶ Buie Decl. Resp. Ex. 4 at ¶¶ 39-42.

⁵⁶⁷ Declaration of Marc Billingsley at ¶ 28 (Comp. Exh. 6); Declaration of Bennett Hooks at ¶¶ 40-42 (Compl. Exh. 4).

340. EAI approved attachment to a small number of poles shortly before the parties met with Commission Staff for informal mediation.⁵⁶⁸ [EAI cannot stipulate to this statement as written. EAI responded to, and approved, the written application submitted earlier this year. Comcast submitted six applications for a total of only 13 attachments; Alliance submitted one application for a total of sixteen attachments.⁵⁶⁹]

341. EAI will permit additional attachments only after EAI conducts a post-inspection survey and determines that the entire circuit is free of violations.⁵⁷⁰ [EAI cannot stipulate to this statement for the reasons stated below. EAI has permitted additional attachments despite unresolved violations still existing on a circuit.⁵⁷¹]

342. After years of USS inspections of Comcast and Alliance facilities, and the correction of thousands of alleged “violations,” EAI has yet to clear a single circuit.⁵⁷² [EAI cannot stipulate to this statement. It omits the fact that EAI did not dictate the order or priority that Complainants’ have selected with respect to which corrections they have chosen to

⁵⁶⁸ Complaint. ¶ 203.

⁵⁶⁹ Welch Decl. Resp. Ex. 19 at ¶¶ 23-30; Resp. Exs. 28, 29, 32-34.

⁵⁷⁰ Declaration of Marc Billingsley at ¶ 28 (Compl. Exh. 6); Declaration of Bennett Hooks at ¶ 41 (Compl. Exh. 4).

⁵⁷¹ Welch Decl. Resp. Ex. 19 at ¶¶ 23-30.

⁵⁷² Declaration of Marc Billingsley at ¶ 42 (Exh. 6); Declaration of Bennett Hooks at ¶ 42 (Exh. 4).

address.⁵⁷³ EAI further disputes that thousands of violations have been corrected.]

343. Although EAI has asserted that it cannot permit additional attachments to be installed on its poles by Comcast and Alliance for reasons of safety and reliability, as stated above, the majority of the alleged “violations” attributed to Complainants are not safety violations at all, but are in full compliance with the NESC and industry standards.⁵⁷⁴ [EAI cannot stipulate to this statement. As stated elsewhere herein, all violations cited do not conform to EAI’s contract standards, and 95% cited violate any version of the NESC.⁵⁷⁵]

344. EAI’s access denials for “violations” that otherwise meet or exceed NESC and industry standards have no basis in safety, reliability or generally applicable engineering principles.⁵⁷⁶ [EAI cannot stipulate to this statement. EAI has not denied access in the manner alleged. EAI would be justified in denying access for safety reasons as addressed herein given the linear nature of the pole plant and the large number of violations, 95% of which violate any version of the NESC.⁵⁷⁷]

⁵⁷³ Tabor Decl. Resp. Ex. 17 at ¶ 22; Arnett Decl. Resp. Ex. 1 at ¶ 33.

⁵⁷⁴ Harrelson Report at Article B, pp. 25-26 (Compl. Exh. 15); Harrelson Reply Report ¶¶ 84-88.

⁵⁷⁵ Arnett Decl. Resp. Ex. 1 at ¶ 23; Tabor Decl. Resp. Ex. 17 at ¶ 20; Buie Decl. Resp. Ex. 4 at ¶¶ 29, 30, 48, 60, 86; Kelley Decl. Resp. Ex. 11 at ¶ 9.

⁵⁷⁶ Harrelson Report at Article B, pp. 25-26 (Compl. Exh. 15); Harrelson Reply Report ¶¶ 56-63.

⁵⁷⁷ Arnett Decl. Resp. Ex. 1 at ¶ 23; Tabor Decl. Resp. Ex. 17 at ¶ 20; Buie Decl. Resp. Ex. 4 at ¶¶ 29, 30, 48, 60, 86; Kelley Decl. Resp. Ex. 11 at ¶ 9.

345. Many violations Complainants cannot clear without EAI and other attachers adjusting their own facilities.⁵⁷⁸ [EAI cannot stipulate to this statement. As stated elsewhere, only 10% of cited violations require the action of a party other than the Cable Operator to remedy.⁵⁷⁹]

b) EAI

346. EAI conditioned access to its poles in the past on remediation of safety violations on the applicant's existing attachments in a circuit for which it seeks attachment.⁵⁸⁰ For recent applications submitted since January 2005, EAI has either granted unconditional access, or has required correction of safety violations on poles adjacent to the poles for which access is sought.⁵⁸¹ [Complainants stipulate that EAI, under the threat of Complainants filing this Complaint approved a small number of attachments, conditionally.]

347. The Cable Operators did not submit any attachment applications to EAI for consideration during the time in which they claim that EAI undertook a permitting "freeze." Despite the alleged denial of access, Comcast proceeded to continue to make installations on EAI's distribution poles without submitting a request for attachment.⁵⁸² [Complainants cannot stipulate to this paragraph. Complainants did not submit applications because of Entergy's unequivocal representation that it

⁵⁷⁸ Hooks Decl. ¶ 26; Billingsley Decl. ¶ 42.

⁵⁷⁹ Tabor Decl. Resp. Ex. 17 at ¶ 27; Wagoner Decl. Resp. Ex. 18 at ¶ 45.

⁵⁸⁰ Welch Decl. Resp. Ex. 19 at ¶ 23.

⁵⁸¹ Welch Decl. Resp. Ex. 19 at ¶ 23.

⁵⁸² Tabor Decl. Resp. Ex. 17 at ¶¶ 9, 10.

would not grant access.⁵⁸³ Further, Entergy's allegations of unauthorized attachments refer to underground and overlash installations for which Complainants need not submit applications.^{584]}

3. Stipulated points of law

348. Under 47 U.S.C. § 224, a utility is obliged to provide cable television systems with “nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it.”⁵⁸⁵ A utility pole owner may deny access to its poles for insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes.⁵⁸⁶

4. Disputed points of law

a) Complainants (all except for Cox)

349. It is unjust and unreasonable for EAI to deny access by imposing a permit freeze on poles for which there are no reasons of safety, reliability or generally applicable engineering purposes to support the denial.⁵⁸⁷ [EAI cannot stipulate to this statement as it represents Complainants' conclusion of law and assumes disputed facts.]

350. It is unjust and unreasonable for EAI to deny access to poles without violations until all other poles in the circuit are clear.⁵⁸⁸ [EAI cannot stipulate to this statement for the reasons cited above.]

⁵⁸³ See, e.g., Compl. Exhs. 7, 8, 9, 12.

⁵⁸⁴ Billingsley Reply Decl., ¶ 52

⁵⁸⁵ 47 U.S.C. § 224(f)(1). 47 C.F.R. § 1.1403(a).

⁵⁸⁶ 47 U.S.C. § 224(f)(2).

⁵⁸⁷ 47 U.S.C. § 224(f)(2). Harrelson Reply Report ¶¶ 84-88.

⁵⁸⁸ 47 U.S.C. § 224(f)(2). Harrelson Reply Report ¶¶ 84-88.

351. It is unjust and unreasonable for EAI to deny access to poles where Complainants cannot make corrections until other parties, including EAI or the telephone companies, make corrections first.⁵⁸⁹ [EAI cannot stipulate to this statement for the reasons cited above.]

b) EAI

352. Utilities may deny access to poles for reasons of insufficient capacity, or for reasons of safety, reliability and generally applicable engineering purposes.⁵⁹⁰ EAI would have been justified in denying access based on the widespread nature of the violations identified with respect to Complainants' plant.⁵⁹¹ The language of the statute does not limit safety, reliability or engineering considerations to a particular pole to which attachment is sought. These concepts necessarily encompass the safety, reliability and engineering issues of the *entire electric plant*, not just an isolated pole. [Complainants stipulate to the first sentence. Complainants cannot stipulate to the second sentence.⁵⁹² Complainants cannot stipulate to the last two sentences because they are new legal theories first presented in

⁵⁸⁹ Hooks Decl. ¶ 26; Billingsley Decl. ¶ 42; Harrelson Reply Report ¶¶ 84-88.

⁵⁹⁰ § 224(f)(2).

⁵⁹¹ Buie Decl. Resp. Ex. 4 at ¶ 38; Welch Decl. Resp. Ex. 19 at ¶ 23.

⁵⁹² Summary pages, Response Exhs. 90-93; Billingsley Reply Decl. ¶¶ 6-16; Hooks Reply Decl. ¶¶ 5-12; Gould Reply Decl. ¶¶ 6-12; Allen Reply Decl. ¶¶ 4-12; Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response Exhibit 91; Trouble Ticket 100009396, page 12, Tab 3, Volume 4, Response Exhibit 93; Trouble Ticket 1001045047, page 28, Tab 1, Volume 1, Response Exhibit 92; Outage Summary Charge, Reply p. 14; Trouble Ticket 1038412558, page 20, Tab 15, Volume 2, Response Exhibit 90; Trouble Ticket 1022516697, page 39, Tab one, Volume one, Response Exhibit 92; Harrelson Reply Report ¶¶ 12-15.

this document, are unsupported by law and do not reflect the state of the law.]

353. The limited conditions placed on the Cable Operators' access, therefore, are eminently reasonable.⁵⁹³ The linear nature of the pole plant makes it reasonable for a utility to take into account the safety and engineering concerns on adjacent poles when considering a request for access.⁵⁹⁴ Safety concerns such as low hanging cables or guying deficiencies, for example, may result in physical damage to adjacent poles or cascading electric failures.⁵⁹⁵ [Complainants cannot stipulate to this paragraph. As explained in both Harrelson Reports, Entergy's requirements are inconsistent with industry standards and are not adopted for safety purposes.]

C. Are the Cable Operator's denial of access claims valid?

1. Stipulated Facts

354. . None.

2. Disputed Facts

a) Complainants

355. Complainants' denial of access claims are valid. Prior to Complainants seeking relief with the FCC, EAI did not permit access to its poles.⁵⁹⁶ [EAI cannot stipulate to this statement. None of the complainants

⁵⁹³ Resp. at ¶¶ 114-116.

⁵⁹⁴ Buie Decl. Resp. Ex. 4 at ¶¶ 35-42.

⁵⁹⁵ Buie Decl. Resp. Ex. 4 at ¶¶ 39-42.

⁵⁹⁶ *See, e.g.*, Compl. Exhs. 7, 8, 9, 12.

had written access requests pending until January 2005. Those applications have been approved.⁵⁹⁷]

356. Where Complainants have been denied access for new installations, Complainants have overlashed cable to existing facilities and have made underground installations. EAI has cited these activities as unauthorized attachments.⁵⁹⁸ [EAI cannot stipulate to this statement as it has no record evidence and was not previously pleaded. EAI did not include overlashing or undergrounding as unauthorized attachments.]

b) EAI

357. During the time of the alleged denial of access, none of the Complainants had any written attachment applications on file with EAI; accordingly EAI could neither approve nor deny any requests that were not pending before it.⁵⁹⁹ If submitted, EAI would have responded to them in conformance with the FCC's rules for evaluation of such access requests.⁶⁰⁰ [Complainants cannot stipulate to this paragraph. EAI had told Complainants that they could not access EAI's poles.⁶⁰¹ Complainants saw no point in spending the time and money to prepare applications that EAI made clear would be denied anyway. Moreover, Complainants made requests

⁵⁹⁷ Welch Decl. Resp. Ex. 19 at ¶ 24.

⁵⁹⁸ Billingsley Reply Decl., ¶ 52

⁵⁹⁹ Resp. at 117; Welch Decl. Resp. Ex. 19 at ¶ 24.

⁶⁰⁰ Welch Decl Resp. Ex. 19 at ¶¶ 23-25.

⁶⁰¹ *See, e.g.*, Compl. Exhs. 7, 8, 9, 12.

for access, and Entergy denied them, in writing.⁶⁰² Requests for access are not restricted to formal pole attachment permits.^{603]}

358. None of the Complainants submitted a written pole attachment application until January 2005, and then only for a very few number of attachments. EAI has acted on all of these applications, approved several of them unconditionally and approving several others with conditions requiring the remediation of safety violations on immediately adjacent poles.⁶⁰⁴

3. Stipulated Points of Law

359. None.

4. Disputed Points of Law

a) Cable Operators

360. Requests for access must be granted or denied in writing within 45 days of the request for access.⁶⁰⁵ However, a denial need not be in writing to be actionable under the Commission's pole attachment complaint procedures. "Time is of the essence on access matters and dilatory cooperation is as effective as denial."⁶⁰⁶ [EAI cannot stipulate to this statement. The quotation is taken out of context, as it relates to KCPL's failure to replace a pole after payment was made. Moreover, Complainants delayed years before bringing this denial of access claim.]

⁶⁰² See, e.g., Compl. Exhs. 7, 8, 9, 12.

⁶⁰³ See e.g., *Kansas City Cable Partners v. Kansas City Power & Light*, 14 FCC Rcd. 11599, ¶ 16 (1999).

⁶⁰⁴ Welch Decl. Resp. Ex. 19 at ¶¶ 23-30.

⁶⁰⁵ 47 C.F.R. § 1.1403.

⁶⁰⁶ *Kansas City Cable Partners v. Kansas City Power & Light*, 14 FCC Rcd. 11599, ¶ 16 (1999).

361. The FCC's preferred method of dispute resolution is through private negotiation.⁶⁰⁷ EAI's denial of access has been continuing, as the parties have attempted to work out a private, negotiated resolution. [EAI cannot stipulate to this statement for the reasons cited below.]

b) EAI

362. Requests for access must be made in writing, and must be denied within 45 days of the receipt of such a request. Claims for denial of access must be filed within 30 days of such a denial.⁶⁰⁸ Denials must be in writing, explicit and unequivocal.⁶⁰⁹ [Complainants cannot stipulate to this section because it misconstrues the state of the law for the reasons set forth in its disputed law section.]

363. Complainant's claims are procedurally deficient (no written request for access); untimely (not within 30 days of alleged denial of access); and moot (applications are being accepted and processed).⁶¹⁰ Complainants' "freeze" allegations are therefore unsupported and should be dismissed. [Complainants cannot stipulate to these points of law for the reasons set forth above.]

⁶⁰⁷ *Kansas City Cable Partners v. Kansas City Power & Light*, 14 FCC Rcd. 11599, ¶ 16 (1999).

⁶⁰⁸ 47 C.F.R. § 1.1404

⁶⁰⁹ *Id.*

⁶¹⁰ 47 C.F.R. § 1.1404(m); Resp. 117-127; Welch Decl. Resp. Ex. 19 at ¶¶ 24-31; Resp. Ex. 28; Resp. Ex. 34.

D. Whether EAI May Deny Access Based On Complainants' Failure To Adhere To Standards That Exceed The NESC.

1. Stipulated facts

364. None.

2. Disputed facts

a) Complainants

365. It is unjust and unreasonable for EAI to deny access based on the Complainants failure to adhere to standards that exceed the NESC. [EAI cannot stipulate to *any* statement in this section. Each assertion is repetitive of assertions made elsewhere and are addressed elsewhere by EAI.⁶¹¹]

366. The EAI Pole Agreements contain construction standards that exceed the NESC requirements and standard industry practices.

367. The terms referenced in (i) above either (a) were not in earlier agreements with EAI, under which the vast majority of the Complainants' Service Area plant was constructed, or (b) existed in the agreements, but EAI did not require the cable operators to adhere to them.⁶¹²

368. The NESC explains that heightened standards do not increase safety.⁶¹³

⁶¹¹ See, e.g., Section IV.A.

⁶¹² Declaration of Marc Billingsley (Compl. Exh. 6); Declaration of Bennett Hooks (Compl. Exh. 4); Declaration of Jeff Gould (Compl. Exh. 3); Declaration of Charlotte Dial (Compl. Exh. 5).

⁶¹³ Harrelson Reply Report ¶¶ 49-50.

369. EAI has failed to justify its heightened standards by showing how they increase reliability or promote generally applicable engineering purposes.⁶¹⁴

370. EAI's construction crews do not comply strictly with the engineering standards with which EAI requires Complainants to comply strictly as a condition of access.⁶¹⁵

371. EAI does not have a clear, consistent set of standards. ⁶¹⁶

372. The standards used to identify safety violations vary between EAI and USS.⁶¹⁷

373. EAI field personnel, with whom Complainants have a long history in the field, often grant oral approvals, waivers and variations to EAI's standards that exceed the NESC.⁶¹⁸

b) EAI

374. EAI has not denied access to complainants. EAI has processed the applications submitted to it, and granted access to the poles requested.⁶¹⁹

⁶¹⁴ (*See* Response Sec. V.B.)

⁶¹⁵ Harrelson Report pp. 3, 11-12, 20, 24 (*See* Complaint Sec. VIII.C). Harrelson Reply Report p. 38, 40, 44-62; Gould Reply Decl. ¶¶ 22-24; Billingsley Decl. ¶¶ 23-24, 26-27, 46.

⁶¹⁶ Dunlap Reply Decl. ¶¶ 5-7; Allen Reply Decl. ¶¶ 18-19; Hooks Reply Decl. ¶¶ 16-19; Gould Reply Decl. ¶¶ 17-21, 30; Billingsley Decl. ¶¶ 23-24 (Reply Sec. V.C.).

⁶¹⁷ Allen Reply Decl. ¶ 15; Hooks Reply Decl. ¶ 16; Dunlap Reply Decl. ¶¶ 3-6; Gould Reply Decl. ¶ 17-19; Billingsley Reply Decl. ¶¶ 23-24.

⁶¹⁸ Billingsley Reply Decl., ¶ 40; Hooks Reply Decl., ¶ 24; Allen Reply Decl., ¶ 19. (*See* Reply Sec. III.D.2)

⁶¹⁹ Welch Decl. Resp. Ex. 19 at ¶¶ 23-30.

3. Stipulated points of law

375. Standards in excess of the NESC are not *per se* unlawful.

4. Disputed points of law

a) Complainants

376. It is unjust and unreasonable for EAI to hold Complainants to strict compliance with the Pole Attachment Agreements where EAI's past practice has not previously enforced strict compliance.⁶²⁰ [EAI cannot stipulate to *any* statement in this section. Each assertion is repetitive of assertions made elsewhere and are addressed elsewhere by EAI.⁶²¹]

377. It is unjust and unreasonable for EAI to penalize Complainants for conduct consistent with the parties prior practices.⁶²²

378. It is wholly unreasonable for EAI now to claim that Complainants' conduct, consistent with the parties' prior practices, are evidence of wrong doing or otherwise justify conducting an audit or survey at Complainants' expense.⁶²³

⁶²⁰ See *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

⁶²¹ See, Section IV.A.4, *supra*.

⁶²² *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003)

⁶²³ *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003)

b) EAI

379. This question, as phrased by Complainants, first necessitates a finding that standards in excess of the NESC are unlawful, which EAI denies and the law does not support.⁶²⁴ As illustrated elsewhere, a staggering amount of violations exist regardless of which yardstick – the contract or the NESC – is used.⁶²⁵ Denial based on widespread safety concerns (under either standard) would be justified as a general matter.⁶²⁶ A more tailored policy restricting attachments in circuits where violations still exist is reasonable due to the linear nature of the pole plant and the potential for cascading electrical damage or domino-type physical damage to surrounding poles where another pole is non-compliant.⁶²⁷ An even *more* tailored condition for access based on remediation of violations, most of which do not meet the NESC, on poles adjacent to the poles for which access is sought, is well beyond what is required by law. [Complainants cannot stipulate to this paragraph because they disagree that the question necessitates a finding that standards in excess of the NESC are unlawful. The question asks that very question: whether standards in excess of the NESC are unlawful. Complainants further disagree that there are a staggering amount of

⁶²⁴ Buie Decl. Resp. Ex. 4 at ¶ 25.

⁶²⁵ Arnett Decl. Resp. Ex. 1 at Attachments B, C; Resp. Ex. 94.

⁶²⁶ Welch Decl. Resp. Ex. 19 at ¶¶ 23-31.

⁶²⁷ Buie Decl. Resp. Ex. 4 at ¶ 39.

violations under any standard of measurements.⁶²⁸ Complainants further disagree that EAI's policies are reasonable.]

E. Whether Complainants Have Installed And Maintained Their Facilities In Accordance With The Parties' Past Practices And If So, Whether EAI May Deny Access Based On Complainants' Conduct That Technically May Not Comply With The Pole Attachment Agreements But Is Consistent With The Parties' Past Practices.

1. Stipulated facts

380. None.

2. Disputed facts

a) Complainants

381. Complainants have installed and maintained their facilities in accordance with the parties' past practices. It is unjust and unreasonable for EAI to deny access based on Complainants' conduct that technically may not comply with the pole attachment agreements but is consistent with the parties' past practices. [EAI cannot stipulate to these statements. EAI disagrees that Complainants' attachments were made in conformance with past practices, or that any waiver of the contract standard was granted.⁶²⁹

⁶²⁸ Summary pages, Response Exhs. 90-93; Billingsley Reply Decl. ¶¶ 6-16; Hooks Reply Decl. ¶¶ 5-12; Gould Reply Decl. ¶¶ 6-12; Allen Reply Decl. ¶¶ 4-12; Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response Exhibit 91; Trouble Ticket 100009396, page 12, Tab 3, Volume 4, Response Exhibit 93; Trouble Ticket 1001045047, page 28, Tab 1, Volume 1, Response Exhibit 92; Outage Summary Charge, Reply p. 14; Trouble Ticket 1038412558, page 20, Tab 15, Volume 2, Response Exhibit 90; Trouble Ticket 1022516697, page 39, Tab one, Volume one, Response Exhibit 92; Harrelson Reply Report ¶¶ 12-15.

⁶²⁹ See, Section IV.A.4, *supra*.